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### INDEPENDENCE OF COMPETITION AUTHORITIES--FROM DESIGNS TO PRACTICES

Contribution from Estonia

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## INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

### -- Estonia --

#### 1. General background information

1. The Estonian Competition Authority (ECA) was established in the year 1993 when the former Price Authority within the administrative area of the Ministry of Finance was reorganised to become a supervisory authority over competition, officially named the Competition Board. In 2002, the ECA was transferred to the administrative area of the Ministry of Economic Affairs and Communications.

2. A major reform concerning the functions and design of the ECA was undertaken in 2007, with the result of five agencies within the administrative area of the Ministry of Economic Affairs and Communications being merged into two. The merging parties were the Competition Board, the Energy Market Inspectorate, the Communications Board, the Railway Inspectorate and the Technical Surveillance Inspectorate, which became the Competition Authority and the Technical Surveillance Authority. The merger entered into force on 1st of January 2008. In total, the reform took around 6 months to prepare. The new Competition Authority retained all of its antitrust functions, whilst taking over the tasks of the energy regulator and obtaining some functions of the communications regulator. In addition, some tasks in the railway sector previously exercised by the Ministry of Economic Affairs and Communications were transferred to the ECA, due to requirements of European Union legislation.

3. In 2011 the ECA was also entrusted with additional regulatory functions in the fields of district heating and water supply, which were previously wholly or partly regulated by local authorities. Due to the adoption of the European Union directive on airport charges, the ECA became the agency which settles disputes between airport operators and airport users on applicable rates.

4. Since 1st of July 2014 the ECA was relieved of its functions of telecoms regulator which were transferred to the Technical Surveillance Authority, ending the division of responsibilities between the two agencies, as the latter is now the sole telecoms regulator. Due to the harmonization of EU energy efficiency directive, it has been proposed that the ECA should be responsible for regulatory functions foreseen by that directive.

5. On 1st of September 2015 the amendment to the Government of the Republic Act entered into force, modifying the provisions concerning the planning of the competition supervision at the national level. According to the amendment, the planning of the competition policy as well as Competition Authority were brought from the area of government of the Ministry of Economic Affairs and Communications to the area of government of the Ministry of Justice. The transfer of the ECA was one of the agreed goals of the Government of the Republic to enhance the independence of the Authority's performance of its tasks.

6. At the present time as an executive agency the ECA is a governmental authority, which operates within the administrative area of the Ministry of Justice. The authority exercises state supervision and applies enforcement powers in the fields of competition, electricity, natural gas, district heating, postal services, public water supply and sewerage and railways to the extent prescribed by law. In addition, the Authority settles disputes regarding airport fees. Therefore the ECA is multi-purpose agency with antitrust and regulatory functions, currently employing 45 people of whom 16 work in the Competition Division and 23 in Regulatory Division.

## 2. Legal status, management and funding

7. In Estonia the main legal framework for status and functioning of the governmental agencies is stated in the Government of the Republic Act. According to the law ECA shall report to the Minister of Justice who directs and co-ordinates its activities and exercises supervisory control over it pursuant to the procedure provided by law. Nevertheless, the Government of the Republic Act does not give the ministry any actual power to interfere with the state supervision procedure and influence decisions made in the application of enforcement powers of the state (e.g. the competition law enforcement related proceedings). There is a clear limitation provided for in law that the supervisory control procedure shall not extend to the law enforcement activities of the ECA and the Minister cannot interfere to the Director General's acts of state supervision and decisions made in the application of enforcement powers of the state. The supervisory control does not encompass the right to file a challenge regarding the administrative acts of the Director General of ECA or to give directions on how to decide upon competition law related cases.

8. As a general rule governmental authorities are based on sole directorship in Estonia. The head of a governmental authority shall be appointed to and released from office pursuant to the procedure and on the basis prescribed by law. The principles and conditions of selection of the Director General is stated in the Civil Service Act and in the implementing regulations. According to the Civil Service Act the post of director general of any governmental agency shall be filled by way of a public competition. The public competition to fill the post of a director of the governmental agency shall be performed by the Civil Service Committee for Selection of Top Managers. ECA is directed by the Director General who is appointed to and released from office by the Minister of Justice on the proposal of the Secretary General of the Ministry based on results of public competition. The head of a governmental authority is appointed for the term of five years and he or she will have been appointed for the next term if his or her candidate has been successful in the public competition for the position. As ECA has dual responsibilities and acting also as regulatory authority the restriction for renewal of the term appointment of Director General is provided for in the EU Gas and Electricity Directives, so, the post of the head of the authority can be filled for a maximum of two terms.

9. The rules for the dismissal of Director General from the service is also regulated in the Civil Service Act. According to the general provisions the head of the authority (as well as any other official) could be released from his or her position before the end of the term as a result of the disciplinary penalty or due to circumstances which would preclude recruitment of official (e.g. punishment for an intentionally committed criminal offence). The Director General of ECA may be released from the service by Minister of Justice on the proposal of the Secretary General of the Ministry.

10. As it is stated in the Anti-Corruption Act the Director General or any other official of the authority shall abstain from any corruption related practices and shall comply with restrictions on activities and procedural restrictions. The Director General is also has obligation to disclose annually his or her economic interests in a declaration of interests.

11. We consider that the system of directorship based on Director General is adequate and effective for the ECA. Although in the case of sole directorship the reputation and image of the authority is depending on the personality and competence of one person, the main advantages of this model is clear, quick and easy decision-making process and flexibility in reaction to changes if needed. The procedure for selection of the head of authority is designed in a way that it is possible in objective way to select a person with the necessary competence and character, and dismiss ineligible and political candidates.

12. The statute of ECA is approved by the Minister of Justice and it states the tasks and area of responsibilities of the main divisions (Competition Division and Regulatory Division), also powers and tasks of the Director General and Heads of the Divisions. Other decision-making powers concerning inner structure, numbers and sizes of departments as well as division of officials to departments is authorized by

Minister to Director General. Although the maximum number of officials and employees of the Competition Authority is limited by the ministry the Director General has right to decide upon the need to employment in service of new people.

13. The decisions regarding the investigations the cases or commencement market studies etc. is taken only by the ECA. As it is has been previously said the Minister cannot interfere into the supervision activities of the Authority. The Government, Minister or any other public body or private person is not allowed to give any binding instructions to authority regarding its supervisory activities. The Government of the Minister cannot overrule any decisions of ECA.

14. As the head of the Authority the Director General has the power to make the most significant decisions concerning the functions and tasks of the ECA. According to the laws and the Statute of the Competition Authority the Director General has the right to issue administrative acts (different types of decisions and mandatory precepts) in administrative proceedings. The drafts of the administrative acts are prepared by the relevant department of the Divisions and are previously approved by the Heads of the Divisions.

15. The Director General approves by his directive a list of the positions in which the officials have the right to participate in criminal proceedings and misdemeanour proceedings within the limits of competence of the Authority. In the misdemeanour proceedings the fine-decision is made by authorised officials. In criminal proceeding the officials of the Authority commence pre-trial investigation with the direction of Public Prosecutors Office and the Court decides upon the punishment, therefore Director General has no influential part in these cases.

16. The two Divisions are led by the Heads of Divisions who are also acting as Deputy Directors General within the authority given by the Director General. Therefore some of the decision-making powers concerning issuing the administrative acts are delegated to the Heads of the Divisions. For instance, the Head of the Regulatory Division may issue precepts, activity licences and decisions regarding the approval of general conditions or maximum price in some sectors concerning undertakings with smaller turnover.

17. ECA has a separate budget allocation and is financed exclusively from the state budget adopted by the parliament. According to the law the ministry (ECA is in the governing area of the Ministry of Justice) is responsible for executing the budget allocated to its governing area. The Minister shall approve and amend the budget of the Authority as well as exercise control over the implementation of the budget. The State Shared Service Center within the governing area of the Ministry of Finance is responsible for the execution and recording the payments. The payments have to comply with the spending limits; the Service Center does not check the payments in any other aspect. The budget holders are responsible for the internal financial control of their commitments and payments. The budget consists of two major divisions: the costs on salaries and the operational costs. At the same time these two divisions are not strict, which means that upon need the Director General can move monetary resources from one division to another. Still, there is no possibility to overspend the budget. It is also a common practice to leave a couple of percent of the budget for reserve, which can be transferred to the next year's budget.

### **3. Challenges and possible changes to ensure independence**

18. Until now the principle of independence of the Competition Authority is directly regulated in some specific legal acts which have been drafted based on the EU legislation. We find that the principle of independence should encompass all our activities and be regulated this way in all the legal acts regulating our activities in different areas of economy. A similar general clause should also be within the general provisions of the Competition Act to ensure maximum legal certainty.

19. ECA's independence has been recently enhanced by subordinating it under the area of government of the Ministry of Justice, instead the Ministry of Economic Affairs and Communications as was the case previously. Although the Ministry of Economic Affairs and Communications elaborates and implements the state's economic policy and economic development plans in most regulatory sectors, including energy, postal, transport sector (and previously also in the field of competition protection), which initially made it easier for ECA to participate in the policy making and setting of general priorities in these sectors, the main disadvantage for the competition supervision was that the ministry (precisely Minister of Economic Affairs and Infrastructure) exercises also the share-holder rights of state-owned enterprises. These enterprises are usually big infrastructure, energy and transportation companies and have often dominant position in the market which relates to their main area of activity. At the same time the Estonian Competition Authority will have to exercise supervision over the compliance of their activities to competition law requirements, despite that the state owns all the shares in these companies. The main problem we have encountered in the past in regards to the Ministry of Economic Affairs and Communications was related to the fact that the ministry was also the shareholder of the majority of Estonian state-owned enterprises. As the above mentioned state-owned enterprises were under the area of governance of the same Ministry as ECA, the enterprises tried to use their good relationship with the Ministry and their position to influence our activities on some occasions. In addition, sometimes the Ministry also made proposals to ECA to analyse some sectors of economy or markets which were under interest of the Ministry. After ECA was transferred last year to the area of governance of Ministry of Justice we feel that we have more formal independence in our activities concerning state-owned enterprises.

20. As it is previously mentioned ECA is funded exclusively from state budget. We feel that it would benefit ECA's activities if more monetary resources were made available for it, including some form of funding from private sector in relation to activities which can be directly attributable to specific undertakings. There are already ongoing discussions in the level of the Ministry of Justice regarding possible additions to the funding model of the Competition Authority.

21. It enhanced the effectiveness of ECA's activities if ECA would have explicit right provided for in law to periodically set its supervision and enforcement priorities regarding the economic sector and specific cases. The transparency and thereby the legitimacy of ECA's activities can be further increased by providing for a requirement to present the annual report of its activities in front of the Parliament. It would also be helpful to provide for a clear mechanism of participation of ECA in legislative processes which result or might result in the adoption of legal provisions or acts having substantial impact on the competition in any markets.